TAKASHIMAYA CONSTRUCTION & DEVELOPMENT SDN BHD & ANOR v. MY INFLUX SDN BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
ZABARIAH MOHD YUSOF JCA
NOR BEE ARIFFIN JCA
[CIVIL APPEALS NO: W-02(NCVC)(W)-60-01-2018, W-02(NCVC)(W)-61-01-2018, W-02(NCVC)(W)-62-01-2018, W-02(NCVC)(W)-63-01-2018, W-02(NCVC)(W)-64-01-2018 & W-02(NCVC)(W)-65-01-2018]
6 MAY 2019

CONTRACT: *Agreement – Breach – Failure to construct, complete and deliver vacant possession of units – Claim for damages – Whether developer and registered proprietor of land liable to refund deposit paid by plaintiffs – Whether sale and purchase agreement in 2007 (SPAs 2007) to build a seven and a half storey building converted or succeeded by new agreement ('JVA') to build a 15 storey building – Whether plaintiffs played active role in facilitating for changes to building – Whether evidence showed that SPAs 2007 was abandoned – Whether there were reservation of rights under SPAs 2007 – Whether plaintiffs estopped from asserting validity of SPAs 2007 – Whether plaintiffs failed or refused to sign JVA for 15 storey building – Whether plaintiffs had basis to enter caveats on land – Whether caveats ought to be removed*

LAND LAW: *Caveat – Removal of – Whether plaintiffs had beneficial interest in undivided share of land – Whether plaintiffs paid full purchase price of property – Whether sale and purchase agreement expressly prohibited plaintiffs from entering any caveat on land – Whether plaintiffs had no basis to enter caveats on land – Whether caveats ought to be removed*

The first defendant ('D1') was the developer of eight blocks of a seven and a half storey shop houses on a piece of land ('the land). The second defendant ('D2') was the registered proprietor of the land and had granted D1 the absolute right to develop the land as a commercial development project described in the sale and purchase agreements between the plaintiffs and the defendants as 'Times Avenue'. By sale and purchase agreements dated 9 November 2007 ('SPAs 2007'), the defendants sold to the respective plaintiffs, the units in Times Avenue. On the same date, the plaintiffs entered into a supplemental agreement with the defendants which allowed the plaintiffs to amend the existing approved building plans for the project in respect of the internal layout of the building. The SPAs 2007 and the supplemental agreement between the plaintiffs and the defendants were signed by PW1, Alvin Thong, in his capacity as the plaintiffs' director. He was also a shareholder of the six companies (My Influx Sdn Bhd, Alpha Sanctuary Sdn Bhd, Reflek Tenaga Sdn Bhd, Magnum Imports Sdn Bhd, Cascade Mission Sdn Bhd and Liberty Luck Sdn Bhd). Pursuant to the SPAs 2007, the plaintiffs paid to D1, 35% of the purchase price *ie*, RM1,721,419

as deposit and this deposit was to be treated as part payment towards the purchase price upon the completion of the project. The defendants alleged that at the plaintiffs' request, the defendants made changes to the plans and obtained DBKL's approval to build a 15 storey building. There was a draft agreement ('JVA') between the defendants and the plaintiffs for the 15 storey project. Although the defendants amended the building plans for the seven and a half storey project and got their architects and consultants to work on the plans and obtained DBKL's approval for the 15 storey project, the plaintiffs did not proceed with the 15 storey project and neither was the JVA executed/signed by both parties. The defendants contended that the plaintiffs had lost interest in proceeding with the 15 storey building and wished to revert to the seven and a half storey building as provided in the SPAs 2007. It was the contention of the plaintiffs that the defendants were to deliver vacant possession of the units to the plaintiffs by 9 November 2010. However, until today, the defendants failed to construct and complete the units. As a result, two of the plaintiffs (My Influx Sdn Bhd and Cascade Mission Sdn Bhd) lodged a private caveat on the register document of title to the land. It was the defendants' case that the seven and a half storey project had been converted or succeeded by the 15 storey project and the plaintiffs were all aware of this fact because they had been engaged in the negotiations with the defendants on the terms as evidenced through the various contemporaneous documents. It was the plaintiffs' position that the defendants had never lawfully terminated the SPAs 2007 and/or the supplementary agreement and that it remained to be binding at all material times. Therefore, *vide* six suits, the plaintiffs sought, *inter alia*, a decree of specific performance against the defendants to complete the construction of the seven and a half storey project and deliver vacant possession of the units and an order that the defendants refund to the plaintiffs all sums had and received by the defendants from the plaintiffs. The defendants counterclaimed, seeking declarations that, *inter alia*, Influx Sdn Bhd and Cascade Sdn Bhd were not entitled to enter caveats on D2's land and that the SPAs 2007 were cancelled. The High Court, after a full trial, ordered for the deposits of RM12,672,016, which was paid by the plaintiffs to the defendants, be returned by the defendants to the plaintiffs and awarded compensation to the plaintiffs pursuant to s. 18 of the Specific Relief Act 1950 and that the defendants were entitled to set off from such compensation all costs and expenses incurred for changing a seven and a half storey building to a 15 storey building. The defendants appealed against the decision of the High Court. The issues that arose were (i) whether D2 was liable to refund the 35% of the deposit paid; (ii) whether the SPAs 2007 and the supplemental agreement were still valid and binding; (iii) whether the plaintiffs were estopped from denying that they had abandoned the seven and a half storey building and the SPAs 2007 or elected to have the 15 storey building; (iv) whether the plaintiffs failed or refused to sign the JVA for the 15 storey building; (v) whether the caveats should be removed; and (vi) whether the plaintiffs could claim for compensation pursuant to s. 18 of the Specific

Relief Act 1950, and if allowed, whether the defendants were entitled to set off from such compensation all costs and expenses incurred for the SPAs 2007 and changing the seven and a half storey building in the SPAs 2007 to a 15 storey building.

Held (allowing appeal; setting aside order of High Court)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) The SPAs 2007 entered into between the plaintiffs and the defendants must be read properly to ascertain the true obligations of D1 and D2 respectively. The role of D1 and D2 were distinct and specific. D1 was the developer and seller while D2 was the proprietor of the land. The party selling the units to the plaintiffs was D1 and not D2. The purchase price was to be paid to D1 and it was D1 who was to deliver the completed units to the plaintiffs. Clearly there was a failure on the part of the High Court Judge to give adequate and sufficient judicial appreciation of the relevant evidence, namely the acknowledgement of the receipt of the payment from D1 and the agreed facts between the parties. The High Court Judge failed to explain the reasons for the order that both the defendants ought to refund the 35% deposit paid to the plaintiffs. (paras 75-78)

(2) To support their contention that D2 should refund the 35% deposit paid, the plaintiff had relied on the fact that D1 and D2 shared and were controlled by the same shareholders. It is trite law that if one is to rely on an allegation that require the lifting of the corporate veil, there must be evidence of actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity and it must be clearly and specifically pleaded. Herein, there was no issue of actual fraud or conduct amounting to fraud in equity which was a non-negotiable prerequisite to justify the lifting of the corporate veil. The facts and circumstances did not justify the lifting of the corporate veil. It is also trite law that a subsidiary company is treated as a separate legal entity from its holding company and officers who sit on the Board of the subsidiary company are not representatives of the parent company. In the premises, the order of the High Court that D2 was liable to refund the 35% of the purchase price which was paid by the plaintiffs to D1, was against the weight of evidence and principles of law. (paras 79, 80, 82 & 87)

(3) There was an agreement to change the seven and a half storey building to a 15 storey building between the parties. Both parties appeared to have ignored the SPAs 2007 that they had signed. Parties had let the completion date under SPAs 2007 (9 November 2010) pass, to be overtaken by events to convert the building. The plaintiffs played an active role in facilitating for the change to a 15 storey building. The plaintiffs knew that the defendants had applied for the development order for the 15 storey building. The plaintiffs were fully aware of the

eventual amendment to the original project with higher density and higher value and was involved in drafting and finalising a new agreement for the new project. The defendants had expended much expenses in the process in conceding to the request by the plaintiffs for the change to the new project. The parties had moved in a different direction from the earlier seven and a half storey building and there was never any reservation of rights. Under these circumstances, there could not be any other inference, other than that the earlier seven and a half storey project under the SPAs 2007 was abandoned. (paras 89, 90, 92 & 94-96)

(4) This was a situation when one party encouraged another to believe in the existence and non-existence of a fact. The plaintiffs had encouraged the defendants to believe that the seven and a half storey building was no longer in existence but superseded by the 15 storey building. From the time when the SPAs 2007 were signed until 2010, the plaintiffs' focus was fixated on the 15 storey building as could be seen from the various steps culminating in the 15 storey building. The conduct of the plaintiffs was such as reasonably to lead the defendants to believe and conclude that the plaintiffs had regarded the SPAs 2007 as at an end. Nothing could be clearer that such acts and conduct amounted to estoppel by encouragement and conduct. As there was no reservation of rights under the SPAs 2007, that amounted to a waiver of their rights under the SPAs 2007. Whether the estoppel was by way of abandonment, encouragement, representation, waiver or election, it applied across the board. From the conduct of the plaintiffs, they were estopped from asserting the validity of the SPAs 2007. (paras 100, 102 & 106)

(5) The plaintiffs asserted that the JVA was abandoned because of the small retail model ('SRM') which led to the 'buy out' of the Hong Kong investors. However, there was no proof of the existence of the SRM and any 'buy out'. It was not supported by any documentary evidence. Consequently, as there was no SRM, the one and only reason for the JVA not being signed was due to the plaintiffs not having the funds to execute the same. Contemporaneous evidence were adduced by the defendants to show that the plaintiffs were financially strapped. There was also no explanation by the High Court as to how she had arrived at the conclusion that it was the defendants who had refused to sign the JVA and that the defendants were dragging their feet in the execution of the same. This amounted to perverse findings by the High Court Judge where appellate intervention was necessary. The plaintiffs here were also approbating and reprobating, which could not be allowed. Given the conduct of the parties, to say that the SPAs 2007 was still alive, was misconceived. (paras 110, 112, 113, 115 & 119)

(6) The plaintiffs had not paid the full purchase price of the property, thus they did not have beneficial interest in the undivided share of the land. This was a requirement before one could be vested with any beneficial interests in the property. In addition, it was provided in cl. 5.17 of the SPAs 2007 that expressly prohibited the plaintiffs from entering any caveat on the land. Therefore, the plaintiffs had no basis to enter the caveats on the land. As the plaintiffs had abandoned the SPAs 2007 and elected to opt for the 15 storey building, the caveats were thus ordered to be removed. (paras 120-122)

(7) The plaintiffs offered no evidence to challenge the defendants' counterclaim. Therefore, the defendants were entitled to the claim for whatever set off, from the monies due to the plaintiffs, of the expenses that the defendants had incurred when changing from the seven and a half storey building to the 15 storey building. (para 123)

Case(s) referred to:

Adams v. Cape [1990] Ch 433 ***(refd)***

Asean Security Paper Mills Sdn Bhd v. CGU Insurance [2007] 2 CLJ 1 FC ***(refd)***

Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 CLJ 131; [1985] CLJ (Rep) 77 FC ***(refd)***

Donald James Rae & Anor v. Bruno Sorrentino & Another Appeal [2014] 1 LNS 1102 CA ***(refd)***

Henderson v. Foxworth Investments Limited [2014] UKSC 41 ***(refd)***

Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(refd)***

Jagdish Singh v. Natthu Singh [1992] 1 SCC 647 ***(refd)***

Jones v. Gibbons [1853] Exch 920 ***(refd)***

Mackt Logistics (M) Sdn Bhd v. Malaysian Airline System Bhd [2014] 5 CLJ 851 CA ***(refd)***

Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 1 LNS 67 FC ***(refd)***

Mohd Nazari Ab Majit v. Tan Keo Hock & Anor [1999] 1 CLJ 601 HC ***(refd)***

Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India ("The Kanchenjunga") [1990] 1 Lloyd's Rep 391 ***(refd)***

Pearl Mill Co Ltd v. Ivy Tannery Co Ltd [1919] 1 KB 78 ***(refd)***

People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd & Ors [1985] 1 LNS 158 HC ***(refd)***

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***

Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***

Tay Chye Huat v. Astral Supreme Berhad [2016] 1 LNS 1129 CA ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Tiow Weng Theong v. Melawangi Sdn Bhd [2019] 2 CLJ 655 CA ***(refd)***

Yap Seong Yee v. Eureka Property Management Sdn Bhd & Another Appeal [2018] 8 CLJ 713 CA ***(refd)***

Legislation referred to:
Contract Acts 1950, s. 44(1)
Evidence Act 1950, ss. 101, 103
National Land Code, ss. 323, 433B
Specific Relief Act 1950, s. 18

For the appellants - Chew Chang Min & Wong Hok Chong; M/s Chew Chang Min
For the respondents - Gopal Sri Ram, Wong Rhen Yen, James Edwin, Goik Kenwayne, Emily Wong & Yasmeen Soh; M/s Colin Victor & Co
For the liquidator - S Raven & Siti Nur Amirah

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCVC-770-12-2016 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] There are six related appeals before us, namely:

(i) W-02(NCVC)(W)-60-01-2018;

(ii) W-02(NCVC)(W)-61-01-2018;

(iii) W-02(NCVC)(W)-62-01-2018;

(iv) W-02(NCVC)(W)-63-01-2018;

(v) W-02(NCVC)(W)-64-01-2018;

(vi) W-02(NCVC)(W)-65-01-2018;

[2] These six appeals originated from six suits in the High Court. Each of the suits was originally originating summons but were converted to writs of summons by an order of court dated 13 October 2016. These six suits were heard together on grounds that they involved the same subject matter, the same defendants, involved common issues and the remedies sought by the respective plaintiffs in the respective suits against the two defendants were the same. The defendants filed their counterclaims against each respective plaintiffs in all six suits and the remedies sought by the defendants in all the six suits are also identical.

[3] Parties will be referred to, as they were in the High Court. The first and the second defendants shall be referred to as D1 and D2 respectively. The plaintiff in each of the six suits shall be referred to collectively as 'the plaintiffs' unless otherwise stated.

Background

[4] D1 is the developer of eight blocks of a 7½ storey shophouses together with a basement car park, common property, common facilities, common services and other approved amenities respectively serving the project on

lands held under Geran No. 12286 to 12294 Lot 865 to 873 Seksyen 62 Bandar and Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur and H.S. (D) 80282 to 80287 PT 345 to PT 350 Bandar and Daerah Kuala Lumpur Negeri Wilayah Persekutuan Kuala Lumpur (now amalgamated and held under freehold Geran 75976 Lot 20005 Seksyen 62 Bandar and Daerah Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur) measuring 1,233 sq. meters (the land).

[5] D2 is the registered proprietor of the land and had granted D1 the absolute right to develop the land as a commercial development project described in the sale and purchase agreements between the plaintiffs and the defendants as "Times Avenue".

[6] By sale and purchase agreements dated 9 November 2007 (SPAs 2007), the defendants sold to the respective plaintiffs, the units in Times Avenue. On the same date, the plaintiffs entered into a supplemental agreement with the defendants which allowed the plaintiffs to amend the existing approved building plans for the project in respect of the internal layout of the building, subject to the terms and conditions therein.

[7] The SPAs 2007 and the supplemental agreement between the plaintiffs and the defendants were signed by Alvin Thong Siew Wai (Alvin Thong - PW1) in his capacity as the plaintiffs' director. He is also a shareholder of the six companies (My Influx Sdn Bhd, Alpha Sanctuary Sdn Bhd, Reflek Tenaga Sdn Bhd, Magnum Imports Sdn Bhd, Cascade Mission Sdn Bhd and Liberty Luck Sdn Bhd).

[8] Pursuant to the SPAs 2007, the plaintiffs paid to D1, 35% of the purchase price ie, RM1,721,419 as deposit and this deposit is to be treated as part payment towards the purchase price upon the completion of the project.

[9] The SPAs 2007 were in respect of the construction of a 7½ storey building with a basement car park of which D1 is the developer. The defendants applied and obtained the consent of the State Authority under s. 433B of the National Land Code as stipulated in the SPAs 2007 for the sale of the units to the purchasers. Approval can be seen from DBKL letters and the approved plans or drawings for the 7½ storey project.

[10] The defendants alleged that at the plaintiffs' request, the defendants made changes to the plans and obtained DBKL's approval to build a 15 storey building. There was a draft agreement (JVA) between the defendants and the plaintiffs for the 15 storey project which contains the comments of both parties.

[11] Although the defendants amended the building plans for the 7½ storey project and got their architects and consultants to work on the plans for a 15 storey building and went on to get DBKL's approval for the 15 storey project, the plaintiffs did not proceed with the 15 storey project and neither was the JVA executed/signed by both parties.

[12] The defendants contend that the plaintiffs had lost interest in proceeding with the 15 storey building and wish to revert to the 7½ storey building as provided in SPAs 2007.

[13] Time was to be of the essence of the SPAs 2007. It is the contention of the plaintiffs that the defendants were to deliver vacant possession of the units to the plaintiffs by 9 November 2010. However, until today, the defendants failed to construct and complete the units.

[14] As a result, two of the plaintiffs (My Influx Sdn Bhd and Cascade Mission Sdn Bhd) lodged a private caveat on the registered document of title to the land at the Federal Territory Kuala Lumpur Land Office on 3 August 2015 *vide* presentation no: 11717/2015.

[15] It is the defendants' case that the 7½ storey project has been converted or succeeded by the 15 storey project and the plaintiffs are all aware of this fact because they were engaged in the negotiations with the defendants on the terms of the 15 storey project and also evidence through the various contemporaneous documents.

[16] It is the plaintiffs' position that the defendants had never lawfully terminated the SPAs 2007 and/or the supplementary agreement. The SPAs 2007 and the supplementary agreement remain to be binding at all material times as there has not been any supervening event or contrary conduct by the plaintiffs to cause it to be otherwise.

[17] Therefore, *vide* these six suits, the plaintiffs seek for the following reliefs:

(i) A declaration that the SPAs 2007 and the supplementary agreement are still valid and binding on the parties;

(ii) A decree of specific performance against the defendants to complete the construction of the 7½ storey project and deliver vacant possession of the units to the plaintiffs within 36 months of the declaration; and/or

(iii) Alternatively, an order that the defendants refund to the plaintiffs all sums had and received by the defendants from the plaintiffs.

[18] The defendants in their counterclaim, seek for the following orders:

(i) declarations that:

(a) Influx Sdn Bhd and Cascade Sdn Bhd were not entitled to enter caveats on D2's land and thus seeking for the removal of the said caveats; and

(b) the SPAs 2007 is not valid and cancelled and the defendants are entitled to forfeit all payments made.

(ii) apart from the declaration and the removal of the caveats, the defendants also seek for the following orders:

(a) the plaintiffs to pay the defendants all costs and expenses for the 7½ storey project and the 15 storey project that had been wasted which consists of, *inter alia*, charges paid to DBKL, Syabas, Tenaga Nasional Berhad, advertisements requested by the plaintiffs, defendants' architect fees, fees for the defendants' consultants who were involved in the 7½ storey project and 15 storey project such as the surveyor, quantity surveyor, mechanical and electrical consultant, fees to change the land use that is paid to Pejabat Tanah Wilayah Persekutuan and preparation of the contract documents for the construction;

(b) In the alternative, D1 seeks for damages against the plaintiffs for failing to proceed with the 15 storey project where D1's damages is the loss from the construction costs of the 15 storey building.

[19] The learned High Court Judge, after a full trial ordered as follows:

(i) Deposits of RM12,672,016 which was paid by the plaintiffs to the defendants be returned by the defendants to the plaintiffs within 30 days from the judgment date;

(ii) Interest of 5% per annum on the said amount from 18 April 2016 until realisation;

(iii) Compensation to the plaintiffs pursuant to s. 18 of the Specific Relief Act 1950 to be assessed by the Deputy Registrar and the defendants are entitled to set off from such compensation all costs and expenses incurred for changing a 7½ storey building to a 15 storey building; and

(iv) Costs of RM5,000 subject to allocator.

[20] The defendants appeal against the decision of the learned High Court Judge. After hearing submissions from both parties and the written submissions, unanimously we find merits in the appeals by the defendants. We allowed the appeals and set aside the order of the learned High Court Judge. Hereinbelow are our reasons for our decision.

Issues

[21] The learned High Court Judge had tabulated several issues which were to be determined, most of which are overlapping. Essentially the main issues are as follows:

(i) Whether the SPAs 2007 and the supplemental agreement both dated 9 November 2007 are still valid and binding;

(ii) Whether the plaintiffs failed or refused to sign the JVA for the 15 storey building;

(iii) Whether the plaintiffs (My Influx Sdn Bhd & Cascade Mission Sdn Bhd) are entitled to lodge a caveat on D2's land;

(iv) Whether the plaintiffs are entitled to claim for compensation pursuant to s. 18 of the Specific Relief Act 1950; and

(v) If compensation to the plaintiffs is allowed, whether the defendants are entitled to a set off from such compensation, costs and expenses incurred for the SPA and changing the 7½ storey building in the SPAs 2007 to a 15 storey building.

Findings Of The Learned High Court Judge

Whether The SPAs 2007 And The Supplemental Agreement Both Dated 9 November 2007 Are Still Valid And Binding

[22] The learned High Court Judge found that the evidence that was presented to the court do not support the position taken by the defendants that the SPAs 2007 were no longer valid. It was established that it was a mutual decision by the parties to develop the 15 storey project, and in pursuance thereof, a JVA was drawn up, which was never executed. The only executed agreement between the parties were the SPAs 2007 and the supplementary agreement. Therefore it remained a 7½ storey building. The nature of the agreement for the 15 storey building was no longer a sale and purchase agreement but a JVA with different terms and conditions.

Whether The Plaintiffs Failed Or Refused To Sign The JVA For The 15 Storey Building

[23] There is no evidence that the plaintiffs had failed to sign the agreement for the 15 storey building. The evidence adduced showed that it was the defendants who were dragging their feet in execution of the JVA for the 15 storey building.

[24] There is credible evidence that the director of the defendants are actively trying to take the project "private" and seeking outside funds to "buy out" the plaintiffs.

Whether The Plaintiffs (My Influx Sdn Bhd & Cascade Mission Sdn Bhd) Are Entitled To Lodge A Caveat On The D2's Land

[25] The learned High Court Judge found that the plaintiffs have a caveatable interest in the land. The learned High Court Judge in her grounds said that she concurred with the submission by the plaintiffs without elaborating further. As such, there shall be no order of damages against the plaintiffs.

[26] The plaintiffs in their submission said that the defendants have not shown in the pleadings and oral testimony why the caveats ought to be removed. Whereas the plaintiffs in their application for the caveat have stated why the private caveats were lodged and unless successfully challenged under the provisions of the National Land Code, such private caveats should remain.

Whether The Plaintiffs Are Entitled To Claim For Compensation Pursuant To Section 18 Of The Specific Relief Act 1950. If Compensation To The Plaintiffs Is Allowed, Whether The Defendants Are Entitled To Set Off From Such Compensation Costs And Expenses Incurred For The SPA And Changing The 7½ Storey Building In The SPAs 2007 To A 15 Storey Building

[27] The learned High Court Judge made findings that, from the factual matrix of this case, the relief for specific performance is not appropriate or suitable. Therefore, the deposit sum of RM12,762,016 to be refunded to the plaintiffs within 30 days from today with accrued interest at 5% per annum from the filing date of this suit till realisation.

[28] Further, the compensation pursuant to s. 18 of the Specific Relief Act 1950 to be assessed by the Deputy Registrar and the defendants are entitled to set off from such compensation all costs and expenses incurred for changing the 7½ storey building to a 15 storey building.

[29] We will deal with the submissions of the defendants first before proceeding with the submissions by the plaintiffs as the defendants are the appellants in this appeal. In determining the issues, the learned High Court Judge made certain orders which form the subject matter of these appeals before us. We will address these issues accordingly in this judgment.

The Defendants' Submission

The Refund Of The 35% Of The Purchase Price By D2

[30] The defendants submit that the learned High Court Judge erred when she ordered D2 to refund RM12,672,016 to all the six plaintiffs with interest at 5% from 18 April 2016 and to pay the plaintiffs damages under s. 18 of the Specific Relief Act 1950 for the following reasons:

(i) It is not disputed that the payment of the 35% deposit of RM12,672,016 was made to D1 and this was acknowledged by the D1;

(ii) The agreed facts specifically state the plaintiffs paid the D1, 35% of the purchase price;

(iii) D1's letter dated 10 January 2011 acknowledged the receipt of the 35% of the purchase price from all six plaintiffs;

(iv) The terms of the SPAs 2007 specifically provide so in sections 3.01 and 4.02;

(v) D2 is only the proprietor of the land on which "Times Avenue" is supposed to be constructed. D1 is the one who is supposed to develop, construct and sell the units in Times Avenue and who received the 35% of the purchase price.

Clearly from the aforesaid, the learned High Court Judge had failed to consider the overwhelming evidence and thus had erred when she ordered against D2, the refund of the 35% of the purchase price to the plaintiffs.

[31] It was raised by the plaintiffs that D2 has to refund because they share the same shareholders as D1. They asked for the lifting of the corporate veil, to attach liability on the D2 for the monies received by the D1 as they share the same shareholders. The defendants referred to the decision of the Court of Appeal in *Donald James Rae & Anor v. Bruno Sorrentino & Another Appeal* [2014] 1 LNS 1102; [2015] 2 MLJ 218 where it was held that:

> [46] While it has been accepted by high authority that the veil of incorporation can be lifted in equity in the interest of justice, such instances are "special circumstances" and are by way of exception which require the particulars of such instances to be clearly pleaded. The judgment of His Lordship Gopal Sri Ram JCA (as he then was) in *Low Kam Loy and Anor v. Baltex Sdn Bhd and Others* [2005] MLJU 225 is instructive:
>
> > In any judgment, in the light of the more recent authorities such as *Adams v. Cape Industries*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interest of justice to do so. It is also my respectful view that *the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity*. (emphasis added).

[32] Thus, to lift the corporate veil, there must be actual fraud and it must be specifically pleaded. Fraud has not been pleaded and neither has it been raised at the court below. It is only now this point is raised. Thus, in such absence, it is insufficient for the corporate veil to be lifted.

[33] For the aforesaid reasons, the defendants submit that the appeal of D2 ought to be allowed and the entire decision reversed.

Validity Of The SPAs 2007 And The Supplementary Agreement

[34] The defendants submit that the learned High Court Judge erred when she found that the SPAs 2007 are still valid, however she dismissed the plaintiffs' prayer for specific performance and instead ordered "compensation pursuant to s. 18 of the Specific Relief Act 1950 be assessed" (paras. [67] and [68] of the grounds of judgment of the learned High Court Judge).

[35] The SPAs 2007 are for a 7½ storey building. As time went on, the entire building was changed to a 15 storey building. There are cogent evidence to show that the plaintiffs played an active role in pushing for the change to a 15 storey building. There was evidence of an agreement to change, namely the JVA, *albeit* in draft form. The completion period under SPAs 2007 is 9 November 2010. The evidence shows that a considerable amount of time (between November 2007 until 2009) was taken to convert to the 15 storey building. There was an admission that Alvin Thong (PW1), who is the director and shareholder of the plaintiffs' company, was the driving force for the change.

[36] A more compelling evidence is the plaintiffs' knowledge that the defendants had applied for the development order from the relevant authority for the 15 storey building. The defendants submit that the plaintiffs' knowledge about the applications to DBKL to change the building from a 7½ storey building to a 15 storey building is conclusive and supported by the averments by the plaintiffs in their affidavits and the evidence of Alvin Thong (PW1).

[37] The parties had moved away from the plan to have the 7½ storey building and there was never any reservation of rights under the SPAs 2007 by the plaintiffs. There was a five years' silence after the SPAs 2007 were signed.

[38] Under these circumstances, the defendants submit that the court can infer that the 7½ storey project was abandoned. There was also no demand from the plaintiffs to the defendants to refund the deposit. However, during submission before us, the defendants' counsel do concede that if the court is to agree that the appeal against the defendants should be allowed, the deposit should be refunded to the plaintiffs, as that is the correct thing to do.

Estoppel

[39] The plaintiffs' actions and conduct were clear representation and encouragement to the defendants (especially D1 as developer) that the plaintiffs no longer wanted to have the 7½ storey building in the SPAs 2007 which led the defendants to believe that the 15 storey building had displaced the 7½ storey building. This is borne out from the averment in the affidavit of Dato' Tan Poh Soon (DW2) where he averred that the plaintiffs' representative and also Alvin Thong (PW1) dealt with the defendants in all matters connected with the change of the 7½ storey project in the SPAs 2007 to the 15 storey project.

The Joint Venture Agreement (JVA)

[40] The learned High Court Judge found that "it was a mutual decision by the parties to develop the 15 storey building, and in pursuance thereof, a JVA was drawn up which was never executed". The learned High Court Judge concurred with the plaintiffs that the "effective game changer" was the defendants' unilateral refusal to sign the JVA. The learned High Court Judge also found from the evidence that it was the defendants who were dragging their feet in the execution of the JVA for the 15 storey building.

[41] The defendants submit that there is absolutely no evidence that the defendants were dragging their feet. The defendants forwarded reasons as to why the JVA was not signed, namely that the plaintiffs do not have the funds. This is borne out from the evidence, as follows:

(i) Alvin Thong's (PW1) admission that "the local companies do not have money" and Dato' Tan Poh Soon's (DW2) evidence that the defendants

A are prepared to sign the JVA but DW2 believed that the plaintiffs did not sign the JVA because they could not get funding for the 15 storey building;

(ii) the SSM reports show plaintiffs have negative reserves and that all the accounts were in the negative;

B

(iii) an email produced by the plaintiffs where the plaintiffs said their cash management will become critical if D1 asked for a 30% down payment for the 15 storey building.

The defendants submit that the learned High Court Judge had committed C serious error when she failed to consider the aforesaid evidence and came to a flawed conclusion that it was the defendants who had dragged their feet in executing the JVA. There was no explanation as to how the learned High Court Judge had arrived at such conclusion and/or how she appraised the evidence and issues that determine the outcome of the case. Clearly, the D findings of the refusal by the defendants to sign the JVA was not borne out from the evidence. Hence the defendants submit that the learned High Court Judge's finding is erroneous.

[42] The learned High Court Judge found that "PW1 had in the meantime come up with his small retail model (SRM)" and that "DW2 bought into E PW1's SRM model and he then embarked on a scheme to buy out the six plaintiffs' interest in Times Avenue" (para. [50] of the grounds of judgment). It was also the assertion by Alvin Thong (PW1) that the JVA was abandoned because of the SRM which led to the "buy out" of the Hong Kong investors.

F **[43]** The defendants submit that the existence of the alleged SRM was never proven by the plaintiffs, whether by documents, letters or e-mail. In fact there is not a single document shown as to its existence. Alvin Thong (PW1) mentioned that he paid RM120,000 for the valuation report for the SRM, however he, and for that matter the plaintiffs, failed to produce any valuation G report nor any bill or invoice for RM120,000. In the final analysis, there is no proof of the existence of the SRM and the JVA was not abandoned as alleged and there is no buy out of the Hong Kong investors. Therefore, Alvin Thong's (PW1) statement that the JVA was abandoned because of the existence of the SRM is not true. Consequently, as there is no SRM, the one H and only reason why the JVA was not signed was that the plaintiffs did not have the funds to execute the same.

[44] Therefore, the defendants submit that the findings of the learned High Court Judge on the SRM at para. [50] in her grounds are clearly not supported by the evidence.

I

Caveats

[45] The defendants submit that the caveats which were lodged by the two plaintiffs ought to be removed and damages assessed as the evidence shows that the plaintiffs are estopped from enforcing the SPAs 2007 and that they have abandoned the same when they elected to proceed with the 15 storey building. In any event, the SPAs 2007 prohibits the lodgement of caveat on the land.

[46] Therefore, based on the overwhelming evidence and admissions by the plaintiffs of their election to proceed with the 15 storey building, the defendants urge this court to allow their appeals and that their counterclaim be allowed.

The Submission By The Plaintiffs

The Refund Of The 35% Of The Purchase Price By D2

[47] On the issue that the learned High Court Judge had erred when she ordered D2 to refund 35% of the purchase price to the plaintiffs; the plaintiffs submit that it was never the case that the defendants are not jointly liable. In fact, the affidavit of the defendants in opposition to the originating summons was affirmed by Dato' Tan Poh Soon (DW2) on behalf of both defendants (refer to p. 97 Jilid 1 (1) of the CB). Further, in the affidavit in opposition to the originating summons, the defendants could have elected to take the position that they are separate but they are represented by the same set of solicitors.

[48] The SPAs 2007 were between the plaintiffs and the defendants. It was never the case in the High Court below that D2 is not liable to the plaintiffs. Counsel for the plaintiffs referred this court to the SPAs 2007 and submit that one can be the agent of the other.

[49] Counsel for the plaintiffs further submit that the plaintiffs are not trying to lift the corporate veil but asserts that these two companies have the same directors and shareholders and that they acted jointly. That is why the learned High Court Judge did not deal with the question on the issue of the lifting of the corporate veil as it was never put to her. In any event, there is nothing in the terms of the SPAs 2007 which shows that the defendants exercised separate obligations. The question still remains whether they are joint promisors. In joint promisors, it does not matter to whom the monies are paid. In this regard, counsel for the plaintiffs referred this court to s. 44 (1) of the Contract Acts 1950.

[50] There cannot be a sale and purchase of the land without the concurrence of the landowner. There is nothing in the SPAs 2007 that severs D1 and D2 as separate obligors. There was this joint arrangement between the two of them. By reason of s. 44 (1) of the Contracts Act 1950, the learned High Court Judge was entitled to order against both of them.

[51] The plaintiffs submit, on proper construction of the SPAs 2007, there is a joint agreement between D1 and D2. The plaintiffs are the buyers and they can only buy from the person nominated by D2. This is not a case where there is only one promisor. It would have been different if the proprietor is not a party to the SPAs 2007. Section 2.05 of the SPA 2007 was referred to (p. 632 of the CB Jilid 2/6) which reads:

> Section 2.05
>
> The said Land is presently charged to a financial institution and the Developer reserves the right to discharge such charge or to create further charge(s) or other encumbrances over the said Land or any part thereof in favour of such banks or institutions as the Developer may require as security or additional security for such amounts and on such terms and conditions as the Developer may deem fit for the purpose of or incidental to the financing of the Project.

From the aforesaid provision, the fact that the proprietor has put the land in the developers' control is made clear. By the aforesaid clause of the SPAs 2007, the registered proprietor has authority and the developer had even authorised the charge.

[52] Hence the plaintiff submits that there is nothing wrong in the order that the learned High Court Judge made when she ordered D2 to refund the 35% of the purchase price to the plaintiffs.

Validity Of The SPAs 2007 And The Supplementary Agreement

[53] It was suggested by the defendants that the prime movers for the change from a 7½ storey to a 15 storey building is the plaintiffs. Counsel for the plaintiffs submits that in fact it was a mutual agreement. The letter at Jilid 2(8) at p. 831 CB which is a letter from the defendants' solicitors dated 19 January 2010 to the solicitors for the plaintiffs who were attending to the SPAs 2007, to explore other options, bears testimony to this. These intended amendments to the original design and different usage of the 7½ storey building (the boutique hotel, the 15 storey, the small retail model) had all been exploratory. Nothing specific came out of the deliberation and the efforts of the parties. Parties had jointly agreed to explore these other options. The plaintiffs as purchasers would have been powerless to explore other design options if the defendants as developer of the land did not agree to such exploration. In fact, contemporaneous documents show D1 instructed the consultants to study and thereafter make relevant changes to the building plans in order that the 15 storey building could be constructed according to the new design mutually agreed between the parties. This was copied to D1 and D2 and they were referred to the SPAs 2007 executed between the parties. At all times, there was recognition by all parties that SPAs 2007 had been extended.

[54] The entire scheme of changing was subject to a JVA (CB 2(6) at p. 688) which is still in draft form. All six purchasers are stated in the JVA. Both the land proprietor and D1 were also parties to the JVA. This JVA was never signed.

[55] Counsel for the plaintiffs went on to show as to why was the JVA not signed. The plaintiffs submit that although the defendants contend that they were ready to sign but when cross-examined they were not able to show such willingness. (Refer to bundle 2(3) under the cross-examination of DW2 line 17 p. 462).

[56] It is not correct as submitted by the defendants that the JVA was not signed because the plaintiffs have financial constraints. The plaintiffs do not have to raise any funds. The actual reason as to why the JVA was not signed is because the directors of the defendants wanted to "buy out" the Hong Kong investors but the defendants do not have the funds to do so. That is evidence from the "term sheet" (p. 720 in Jilid 2(6)).

[57] The plaintiffs submit that there has never been any evidence led or facts established by the defendants to show that the plaintiffs have abandoned the SPAs 2007. The plaintiffs referred to Jilid 1 (1) CB at paras. 45-59 of the grounds of judgment of the learned High Court Judge and submit that the learned High Court Judge had considered the evidence.

Estoppel

[58] The evidence in court does not support the point taken by the defendants. To say the plaintiffs remained silent for a long time is not correct. The basis for the silence was absence of the building plans and the defendants were looking for funds for the construction of the 15 storey building. The architect was the best person to testify as to this, but was never called. The condition precedent for the approval by DBKL never took place and the plaintiffs had paid certain sums of money. Hence, s. 18 of the Specific Relief Act 1950 would apply. For clarity, s. 18 of the Specific Relief Act 1950 provides:

> 18. (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.
>
> (2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.
>
> ILLUSTRATION
>
> A contracts to sell a hundred gantangs of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The court is

A of opinion that A has made a valid contract and has broken it, without excuse, to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

ILLUSTRATION

A contracts with B to sell him a house for RM1,000, the price to be paid and the possession given on the 1st January. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour. The decree may besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

(4) Compensation awarded under this section may be assessed in such a manner as the court may direct.

(5) The circumstance that the contract has become in capable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

[59] The plaintiffs submit that there is no estoppel because both parties were waiting to be "bought out" and neither was there any encouragement by the plaintiffs. The estoppel here is not one where the plaintiffs remained silent. The factual matrix here does not support the ground of estoppel now being raised against the plaintiffs. Admittedly, there were discussions to increase the plot ratio of the development and so attain a higher density for the development and a JVA was the intended vehicle to achieve this. They were supposed to sign the JVA which they never did and neither was the "terms sheet" signed.

[60] The question is, why did they not terminate the SPAs 2007 if they say they wanted to proceed to sign the JVA. There was an email dated 22 November 2010 written by the plaintiffs in CB 2(7) at p. 726 which reads as follows:

Hi CY

We have yet to receive any confirmation about the extension sought from your client.

Would appreciate that soonest.

Meanwhile, as instructed we attach the Agreement cleaned of all comments on points that the parties have agreed on. It provides for easier reading.

Please revert on the outstanding issues. Would appreciate if no new issues are raised as we do want to see finalisation of this Agreement and its execution soonest.

Thank You.

Regards

James Edwin Pushparatnam.

The abovesaid letter shows that the plaintiffs are keen to sign the JVA.

[61] As the JVA is not signed, all that is left is the SPAs 2007. The findings of the learned High Court Judge that it was the defendants who were dragging their feet in signing the JVA, are findings of fact. The JVA cannot be signed after what had happened. The defendants took the view they did not want to buy the plaintiffs out so the plaintiffs had to enforce the SPAs 2007. The defendants had never lawfully terminated the SPAs 2007 or the supplementary agreement. The plaintiffs submit that the plaintiffs are never in breach of these agreements. The defendants failed to show why or when the SPAs 2007 or the supplementary agreement ceased to be valid and binding, or why the plaintiffs are estopped from maintaining that these agreements are valid and binding.

[62] Even if the parties had executed the JVA, the obligations of the plaintiffs as purchasers of the lower 7½ storey of the intended 15 storey would still be preserved, as the JVA reaffirmed the contractual obligations of the plaintiffs as purchasers and the defendants as developer and proprietor, as stated in the SPAs 2007. Clause 3.1(d) of the JVA envisaged the provisions of the existing agreement (SPAs 2007) being referred to. Clause 3.1(d) of the JVA reads:

> (d) payments to the Developer of the balance sum of Ringgit Malaysia Twenty Three Million Five Hundred Thirty Three Thousand, Seven Hundred Forty Four (RM23,533,744) in respect of the Basement and Purchaser's Floors shall be made according to that stipulated in the Third Schedule of the Existing Sale Agreement in respect of Ground, 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Floors of the Original Building (Annexed hereto as "Appendix 5"),

[63] The learned High Court Judge had considered all the points raised by the defendants and for good reasons. Refer to RR Bahagian C Jilid 3(2) p. 1148, letter from the plaintiffs which refers to an earlier letter from CY Wong which reiterates the continuing and binding contract between the parties entered into for valuable consideration as evidenced by the execution of the SPAs 2007. The defendants have yet to discharge their obligations under the contract.

[64] The appellate court has no audio-video advantage. It is the trial court which had such advantage and made findings of fact, which does not warrant appellate intervention. The parties had, by their conduct kept the SPAs 2007 alive. It is incontrovertible that the proposed changes did not come to fruition. Hence the only contract which remains is the SPAs 2007 and the supplementary agreement. The SPAs 2007 and the supplementary agreement have all the ingredients of a valid contract and is very much alive.

[65] The plaintiffs referred to an Indian Supreme Court decision of *Jagdish Singh v. Natthu Singh* [1992] 1 SCC 647 on the effect of s. 18 of the Specific Relief Act 1950 which ruled that:

> 24. When the plaintiff by his option has made specific performance impossible, Section 21 does not entitle him to seek damages. That position is common to both Section 2 of Lord Cairn's Act, 1858 and Section 21 of the Specific Relief Act 1963. But in Indian Law where the contract, for no fault of the plaintiff, becomes impossible of performance Section 21 enables award of compensation *in lieu* and substitution of specific performance.

[66] Here there is a specific finding that the plaintiffs are not at fault. Hence the plaintiffs are entitled to compensation *in lieu* of specific performance. The learned High Court Judge was correct in awarding compensation *in lieu* of specific performance.

The "Term Sheet"

[67] The defendants' challenge on the authenticity of the "term sheet" was misplaced as the term sheet was introduced and admitted as Part B document by agreement of the parties (Refer to *Tiow Weng Theong v. Melawangi Properties Sdn Bhd* [2019] 2 CLJ 655; [2018] 6 MLRA, *Mohd Nazari Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601. It is an agreed document.

Caveat

[68] On the issue of caveat, the plaintiffs submit that the plaintiffs had given valuable consideration with the intention to purchase the property, which comprises the land and the building to be erected thereon. Therefore, the plaintiffs have a beneficial interest in the said land or a right to such title or interest recognised in law which allows them to maintain a private caveat on the said land. The plaintiffs referred to s. 323 of the National Land Code. In *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 1 LNS 67; [1976] 1 MLRA 568, the Federal Court observed that:

> [28] It would seem abundantly clear from the authorities that, so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement.

Further in *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193 the Federal Court held:

> [37] ... The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC.

[69] Therefore, the plaintiffs submit that this statutory right is available to the plaintiffs. The caveats remain on the registered document of title and D2 has not incurred any costs for the removal of the caveats. The plaintiffs submit that the defendants have no valid grounds to remove the caveats.

[70] In summary, the plaintiffs submit that the defendants have not discharged the burden to show that the learned High Court Judge was plainly wrong and not just wrong.

Our Decision

Whether D2 Is Liable To Refund The 35% Of The Deposit Paid

[71] From the evidence, it is D1 as developer who has received RM12,672,016, which is the 35% of the purchase price for the 7½ storey building. Even the "plaintiffs' summary" at para. 6 reiterates this point and that D1 acknowledged the receipt of the deposit paid (p. 393 of RR Jilid 1/3). In the event of completion of the project, this deposit payment is to be treated as part payment towards purchase price (refer to p. 172 Jilid 1(2) of the CB).

[72] It is also stated in the agreed facts that the plaintiffs paid the D1, 35% of the purchase price, namely RM1,721,419 as deposit and in the event of completion, as part payment towards the purchase price (para. 9 p. 186 of Jilid 1(2) of the CB).

[73] Further D1 had issued out a letter acknowledging the receipt of 35% of the purchase price from all the six plaintiffs, (pp. 678-680 Jilid 2(6) of the CB).

[74] It is also part of the terms in sections 3.01 and 4.02 of the SPAs 2007 which state that it is D1 as developer that agrees to sell and the plaintiffs as purchasers agree to purchase the unit at the purchase price free from any encumbrances, and that it is the plaintiffs as purchasers who pay out to D1 as developer the sum as set out in section 6 of the First Schedule of the SPAs 2007 being the sum equivalent to 35% of the purchase price.

[75] The SPAs 2007 entered into between the plaintiffs and the defendants must be read properly to ascertain the true obligations of D1 and D2 respectively. As can be discerned from the facts and the terms in the SPAs 2007, D2 is a party to the agreement due to the fact that it is the proprietor and registered owner of the land on which "Times Avenue" is to be constructed. The SPAs 2007 clearly make reference in the preamble to the fact that the party selling the units to the plaintiffs was D1 and not D2. The purchase price was to be paid to D1 and it was D1 who was to deliver the completed units to the plaintiffs. The learned High Court Judge failed to give effect to these clear clauses of the SPAs 2007 and had not looked at the agreement between the parties as a whole in giving effect to every part of the agreement (refer to the Federal Court judgment by Mohd Azmi FCJ in *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 CLJ 131; [1985] CLJ (Rep) 77).

[76] Clearly, there was a failure on the part of the learned High Court Judge to give adequate and sufficient judicial appreciation of the relevant evidence, namely the acknowledgement of the receipt of the payment from D1, the

"plaintiff's summary", and the agreed facts between the parties (refer to *Asean Security Paper Mills Sdn Bhd v. CGU Insurance* [2007] 2 CLJ 1; [2007] 2 MLJ 301).

[77] The plaintiffs contend that D2 remains liable as joint promisor pursuant to s. 44 of Contracts Act 1950 which provides that:

> 44. Any one of joint promisors may be compelled to perform
>
> (1) When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise.
>
> Each promisor may compel contribution
>
> (2) Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.
>
> Sharing of loss by default in contribution
>
> (3) If any one of two or more joint promisors makes default in the contribution, the remaining joint promisors must bear the loss arising from the default in equal shares.
>
> Explanation-Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

We are of the view that s. 44 of the Contracts Act 1950 has no application to the instant appeal. It is clear from the specific provisions in the SPAs 2007 that the role of D1 and D2 are distinct and specific. D1 being the developer and seller while D2 is the proprietor of the land. In any event, this point was never raised in the court below and hence the learned High Court Judge had no occasion to consider this point in adjudicating the case.

[78] The learned High Court Judge failed to explain the reasons for the order that both the defendants refund the 35% deposit paid to the plaintiffs.

[79] Another premise which the plaintiffs relied on, to support their contention that D2 should refund the 35% deposit paid, is because D1 and D2 shared and were controlled by the same shareholders and that there was also no evidence led by the defendants to show that D1 retained the entire deposit sum. This submission and contention by the plaintiffs ignores the "plaintiff's summary" and "agreed facts" that the 35% deposit of the purchase price was paid to D1 and which was acknowledged in writing by D1. Neither was it pleaded in the affidavit of the plaintiffs that D2 should also be liable to refund the said deposit. Instead, in para. 11 of the plaintiffs' affidavit, the plaintiffs averred that:

> Pursuant to the terms of the Agreement, the plaintiff paid the 1st defendant 35% of the Purchase Price i.e. RM1,721,419.00 as deposit and

in the event of completion, as part payment towards the Purchase price. The 1st Defendant acknowledged receipt of the said RM1,721,419.00 ("the Deposit") (refer to page 71 Jilid 1 (1) CB).

[80] On the issue of lifting of the corporate veil, although counsel for the plaintiffs submit that the plaintiffs are not trying to lift the corporate veil but merely stating that D1 and D2 have the same directors and they acted jointly, the contention that the defendants are being controlled by the same shareholders is in reality an attempt to lift the corporate veil. This contention is to attach liability to D2 for the money received by D1 merely because they were controlled by the same shareholders. It is trite law that if one is to rely on an allegation that requires the lifting of the corporate veil, there must be evidence of actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity and it must be clearly and specifically pleaded (refer to this court's decision in *Donald James Rae & Anor v. Bruno Sorrentino* [2014] 1 LNS 1102; [2015] 2 MLJ 218). It is not open for the courts to lift the corporate veil merely premised in the interest of justice to do so (See *Adams v. Cape* [1990] Ch 433).

[81] It is only in appropriate circumstances that the court will pierce the corporate veil. In *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109 the facts justified the lifting of the corporate veil where it involved the Industrial Relations Act 1967 and the Industrial Court was required to disregard technicalities in the interest of justice and the rules of equity and good conscience. In *Mackt Logistics (M) Sdn Bhd v. Malaysian Airline System Bhd* [2014] 5 CLJ 851; [2014] 2 MLJ 518, Abdul Malek JCA in his judgment stated:

> Once a company is incorporated, a veil is cast over the true controllers of the company, through which the law will not usually penetrate. There was no standard principle to guide the courts in piercing the corporate veil. However, there are statutory as well as common law exceptions to the principle enunciated in *Salamon v. Salamon & Co*, and once a case comes within one of the exceptions, the courts may lift the corporate veil of incorporation. In piercing the corporate veil, the facts of the case must be examined and it must be **clearly pleaded** that the veil should be lifted. (emphasis added)

[82] As far as the present appeal is concerned, the facts that necessitate the lifting of the corporate veil were never pleaded and neither was it ever raised at the court below and that was the reason why it was never raised by the learned High Court Judge in her grounds. There was also no issue of actual fraud or conduct amounting to fraud in equity which is a non-negotiable prerequisite to justify the lifting of the corporate veil. As far as the present appeal is concerned, the facts and circumstances do not justify the lifting of the corporate veil. It is also trite law that a subsidiary company is treated as a separate legal entity from its holding company and officers who sit on the

A Board of the subsidiary company are not representatives of the parent company (Refer to *People's Insurance Co (M) Sdn Bhd v. People's Insurance Co. Ltd & Ors* [1985] 1 LNS 158; [1986] 1 MLJ 68).

[83] It is also not for the courts to be creative in inventing causes of action for parties in the guise of justice which does not exist in the first place. Such B practice may give the perception of the court being biased towards one party. This was aptly described by the Federal Court in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188 when it held that:

C
> It is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the D court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[84] The plaintiffs submit that the affidavit in opposition was affirmed by the same deponent for both defendants, hence attaching liability of both defendants jointly. We think not. Merely by the joint affirmation of the E affidavits by the same person for and on behalf of both defendants, *per se*, cannot be a reason to impose joint liability on D2.

[85] Further the allegations that the defendants are controlled by the same shareholders is also misconceived because it is not pleaded.

F **[86]** The plaintiffs also submit that there was no evidence led by the defendants to show that D1 had retained the entire deposit sum. This is again misconceived, as firstly, since it is the plaintiffs that assert, hence the burden is on the plaintiffs to prove such assertion, not the other way round (refer to ss. 101 and 103 of the Evidence Act 1950). Secondly, it is not the pleaded case of the plaintiffs to attach liability on D2.

G **[87]** In the premises, we find that the order of the learned High Court Judge that D2 is liable to refund the 35% of the purchase price which was paid by the plaintiffs to the D1, is against the weight of evidence and principles of law. Clearly the learned High Court Judge erred in facts and law when she made such order which left us with no choice, but to intervene.

H *The Validity Of The SPAs 2007 And The Supplementary Agreement*

[88] It is the finding of the learned High Court Judge that the SPAs 2007 are still valid and ordered compensation pursuant to s. 18 of the Specific Relief Act 1950 be assessed.

I **[89]** The SPAs 2007 are for a 7½ storey building. As time went on the 7½ storey building was changed to a 15 storey building. Alvin Thong (PW1), who is a director and shareholder in each of the six plaintiffs' companies

represented the plaintiffs. The evidence of Derek Chan (PW2), the plaintiffs' witness, who admitted that Alvin Thong (PW1) was the driving force for the 15 storey building and he was the one who gave the idea for the 15 storey building and they agreed (p. 326 of Jilid 2/2 of the CB). It was also Alvin Thong (PW1) who designed the 15 storey building and the proposed price list for sale for the different units which was well received by Dato' Tan Poh Soon (DW2) and the plaintiffs. Alvin Thong (PW1) admitted in his evidence that he persuaded all the plaintiffs to change to the 15 storey building and the plaintiffs proceeded to raise funds for the 15 storey building. Derek Chan (PW2) admitted that Alvin Thong (PW1) took two years between November 2007 until 2009 to come up with the various designs of the 15 storey building. The evidence of Dato' Tan Poh Soon (DW2) also echoed what was said by Alvin Thong (PW1) and Derek Chan (PW2). This is borne out from the defendants' affidavit (p. 105 Jilid 1 (2) of the CB) when Dato Tan Poh Soon (DW2) states that there was no progress billings for the 7½ storey building under the SPAs 2007 "because the 7.5 storey project has already been replaced by the 15 storey project and the time from 2007 to 2010 was used to make changes to the plans of the original 7.5 storey building to a 15 storey building and also to obtain DBKL's approval". There was indeed an agreement to change between the parties. Both parties appear to have ignored the SPAs 2007 that they had signed. The completion period under SPAs 2007 is 9 November 2010. But the evidence shows parties have let this completion date passed, to be overtaken by events to convert the 7½ storey building to a 15 storey building.

[90] The evidence is thus compelling that despite the fact that they had an agreement by virtue of the SPAs 2007, the plaintiffs played an active role in facilitating for the change to a 15 storey building.

[91] It was only five or eight years later that the plaintiffs filed the originating summons. Prior to the originating summons, there is not a single request or demand to ask the defendants to complete the 7½ storey building. This is evidenced by the testimony of Derek Chan (PW2) in cross examination (pp. 380-381 Jilid 2(2) of the CB). His testimony disclosed that from 2011-2015, the plaintiffs had never asked for completion of the 7½ storey building. There was complete silence on the 7½ storey building, although PW2 attempted to justify the silence was due to the JVA. That may be so, but surely not at the expense of passing the date of completion (9 November 2010) under the SPAs 2007! In fact, Derek Chan (PW2) said there is no letter or notice demanding completion of the 7½ storey building because the plaintiffs had moved on to the 15 storey building (pp. 380-381 of the notes of evidence Jilid 2(2) CB).

[92] The evidence also shows that the plaintiffs knew the defendants had applied for the development order for the 15 storey building. The plaintiffs' knowledge about the applications to DBKL to change the 7½ storey building to 15 storey building and to secure DBKL's approval for the 15 storey building can be seen from the following evidence:

(i) In the plaintiffs' affidavit in reply No. 1 where the deponent, Simon Tam stated that "No doubt the parties had full knowledge of the approval of the 15 storey building" (p. 133 Jilid 1(2) CB). Simon Tam is the director of My Influx Sdn Bhd who is a Hong Kong resident;

(ii) Alvin Thong (PW1) confirmed that Simon Tam was referring to DBKL's approval (p. 235 Jilid 2(1) CB);

(iii) Alvin Thong (PW1) admits the plaintiffs also knew about DBKL's conditional approval in December 2009 (p. 237 Jilid 2(1) CB).

DBKL's conditional approval and development order for the 15 storey building specifically states "cadangan pindaan kepada pelan Perintah Pembangunan bertarikh 26 November 2006 kepada cadangan membina kedai pejabat 15 Tingkat Beserta 1 Tingkat Basemen" (pp. 783 and 786 Jilid 2(6) of CB).

[93] Alvin Thong (PW1) admitted that the plaintiffs allowed D1 to obtain the development order for the 15 storey building and did not stop them at all, and neither did they object to the applications to DBKL for the 15 storey building despite knowing about it. Derek Chan (PW2) admitted that the plaintiffs never demanded for the 7½ storey building when they found out about the DBKL's approval (p. 240 of Jilid 2 (1) of CB). When the plaintiffs knew about the development order, none of the six plaintiffs' companies objected to this development order knowing full well it was for the 15 storey building (p. 351 CB Jilid 2/2).

[94] The reason why the plaintiffs did not object to the applications for approval to DBKL was because all of the plaintiffs were happy with Alvin Thong's (PW1) design and concept of the 15 storey building (p. 351 of Jilid 2(2) of CB). The plaintiffs were fully aware of the eventual amendment to the original project with higher density and higher value and was actually involved in drafting and finalising of a new agreement for the new project, which agreement was awaiting to be executed. The amendments were not merely exploratory options but were real amendments carried out and approved by the authorities and the defendants had expended much expenses in the process in conceding to the request by the plaintiffs for the change to the new project.

[95] The aforesaid evidence are proof that parties just moved in a different direction from the earlier 7½ storey building and there was never any reservation of rights. There was a five year of silence after the SPAs 2007 was signed. The evidence are more than compelling to negate the contentions of the plaintiffs that these are mere exploratory options. How does one backtrack when the approval by the authorities have been granted for the 15 storey building, to revert to a 7½ storey building?

[96] Under these circumstances, there cannot be any other inference, other than that the earlier 7½ storey project under the SPAs 2007 was abandoned. There was no demand also to refund the deposit.

[97] If the court has made a finding that has crystallised in a court order that a change has happened from 7½ storey building to a 15 storey building, how can the SPAs 2007 be still valid? When DBKL granted the development order for the 15 storey building, that indicates the end of the 7½ storey building. If the learned High Court Judge acknowledges the subject matter has changed how can the whole subject matter of the SPAs 2007 be still alive? Clearly the learned High Court Judge was plainly wrong in her findings with regards to the validity of the SPAs 2007, given the aforesaid evidence.

[98] The plaintiffs submitted that even if the parties had executed the JVA, the obligations of the plaintiffs as purchasers of the lower 7½ storeys of the intended 15 storey would still be preserved, as the JVA reaffirmed the contractual obligations of the plaintiffs as purchasers and the defendants as developer and proprietor, as stated in the SPAs 2007. Clause 3.1(d) of the JVA envisaged the provisions of the existing agreement (SPAs 2007) being referred to. We are of the view that the whole JVA must be read in its context. The preamble of the JVA in clause (I) at p. 691 of CB 2(6) states as follows:

> I. By a letter of 21st December, 2009 addressed to the developer's architect and another letter of 22nd April, 2010 addressed to the Proprietor, DBKL granted conditional approval to the developer for the development of one block of fifteen (15 storey shop-offices with a basement carpark ("the New Project") on the said Land, thereby **superseding the original Project**. (emphasis added)

The above provision clearly states that the parties are disregarding the earlier 7½ storey project under the SPAs 2007.

Estoppel

[99] The plaintiffs are estopped from denying they had abandoned the 7½ storey building and the SPAs 2007 or elected to have the 15 storey building.

[100] The Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 held that estoppel:

(i) is a flexible principle of wide utility which must be applied in a broad and liberal fashion;

(ii) may be applied to enlarge or reduce the rights or obligations of a party under a contract;

(iii) operates where there is a representation of fact and law and encouragement by one party to another to believe in the existence and non-existence of a fact;

(iv) can also be applied where the encouragement being offered by the party sought to be estopped, comes in the form of silence.

It was further held by the Federal Court that inducement is never an integral part of the doctrine of estoppel and that the party asserting the estoppel need not show detriment:

> All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actings. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that "his conduct was so influenced by the encouragement or representation ... that it would be unconscionable for the representor thereafter to enforce his strict legal rights.

Applying the principles as enunciated in *Boustead Trading*, estoppel applies to the facts of the present appeals when the plaintiffs:

(i) elected to abandon the 7½ storey building and the SPAs 2007;

(ii) elected for the 15 storey building.

The facts of the present appeals also show that the plaintiffs had encouraged the defendants to believe that the 7½ storey building is no longer in existence but superseded by the 15 storey building. The action by the plaintiffs can amount to estoppel by encouragement. This is a situation when one party encourages another to believe in the existence and non-existence of a fact. The following are the events which amount to encouragement by the plaintiffs to the defendants that they no longer wanted the 7½ storey building and have elected to have the 15 storey building:

(i) There was a "whiteboard meeting" on 23 June 2008 between the defendants and the plaintiffs' other directors and shareholders from Hong Kong to discuss a higher density building which included the 15 storey building and none of them objected to changing the 7½ storey building to a 15 storey building;

(ii) Conditional approval for the 15 storey building was given by DBKL on 21 December 2009 in June 2010;

(iii) Plaintiffs engaged James Edwin & Co to draft the JVA for the 15 storey building;

(iv) DBKL issued development order for the 15 storey building on 5 August 2010;

(v) Between June 2010 and late 2010, the negotiation period of the 15 storey building agreement when the alleged SRM came about;

(vi) By late 2010 until early 2011, the JVA for the 15 storey building is finalised.

Further there were active and conscious encouragement which can be seen from the following facts:

(a) The plaintiffs' agreement to the 15 storey building (see Alvin Thong's (PW1) admission);

(b) There was no objection by the plaintiffs when they knew that the plaintiffs went ahead to apply for approval for the 15 storey building which came out on 21 December 2009;

(c) The plaintiffs allowed the defendants to apply for the 15 storey building's development order which was on 5 August 2010;

(d) There was silence by the plaintiffs about the SPAs 2007 and the 7½ storey building since the meeting on 23 June 2008/2009 when the plaintiffs knew the defendants had gone ahead to apply for approval for the 15 storey building.

The Federal Court held that estoppel can also operate by silence when it held as follows:

> Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *Bussche v. Alt* 8 Ch D 286, 314:
>
> > If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really induce the person committing the act, and who light otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

From the facts and circumstances of the present appeals, from the time when the SPAs 2007 were signed until 2010, the plaintiffs' focus was fixated on the 15 storey building as can be seen from the various steps culminating in the 15 storey building. The plaintiffs were busy designing the concepts of the 15 storey building. There was no mention of the SPAs 2007 and neither was there any reservation of rights under the same. This was even when the plaintiffs were aware that the defendants were taking steps to apply for approval of the 15 storey building from the relevant authorities. In fact, the plaintiffs allowed the defendants to obtain the development order for the 15 storey building from DBKL without any objections.

[101] Derek Chan (PW2) said in evidence that the reason why the plaintiffs remained silent for five years for the 7½ storey building is because the plaintiffs had moved on to a JVA for a 15 storey building with the defendants (Refer to pp. 239-240 Jilid 2(1) of the CB). That is precisely the point, namely, parties had abandoned the SPAs 2007 and moving ahead towards the 15 storey project.

Is it just for the plaintiffs to make a U-turn insisting on their rights to have the 7½ storey building as per the SPAs 2007 after all the events that had occurred as aforesaid?

Dato' Tan Poh Soon (DW2) in his evidence took the position that the plaintiffs had lost interest and abandoned the 7½ storey project, when he said in his evidence that:

> The 2007 SPA is not valid anymore because Building 1 was changed to Building 2. After the agreement for Building 2 was not signed, the Purchasers never told us that we must go back to the 2007 SPA. We never received any letter from them that we must proceed with the 2007 SPA. If they wanted to go back to the 2007 SPA and Building they should have told us but they did not. I assume they were not interested anymore in the 2007 SPA and had abandoned it. (pages 612-613 Jilid 2 (5) CB)

[102] Dato' Tan Poh Soon (DW2) is justified in his assumption that the plaintiffs were no longer interested in proceeding with the 7½ storey building anymore because the plaintiffs never mentioned they wish to proceed with the SPAs 2007 for 7½ storey until the plaintiffs (My Influx Sdn Bhd and Cascade Mission Sdn Bhd) lodged a caveat on the land on 3 August 2015. They have kept silent for five years until the caveat was lodged. There was no explanation given by the plaintiffs on the silence and this should be held against the plaintiffs. Clearly this flies in the face of all legal principles. The conduct of the plaintiffs was such as reasonably to lead the defendants to believe and conclude that the plaintiffs had regarded the SPAs 2007 as at an end. Nothing can be clearer that such acts and conduct amount to estoppel by encouragement and conduct. As there was no reservation of rights under the SPAs 2007, that amounts to a waiver of their rights under the SPAs 2007.

[103] It can also be inferred that the plaintiffs' decisions and actions to proceed with the 15 storey building has resulted in the SPAs 2007 coming to an end upon the ground of abandonment. In *Pearl Mill Co Ltd v. Ivy Tannery Co Ltd* [1919] 1 KB 78, where there was a contract for the sale of goods, whereby the defendants by their representatives contracted to sell 50 dozen red welsh roller skins to the plaintiffs. Between the middle of November 1913 and end of September 1914 the defendants delivered some 20 dozen skins at the request of the plaintiffs, but no further deliveries took place nor were any, requested by the plaintiffs, apparently their manager having forgotten the existence of the contract. Between June 1915 and April 1916 another representative of the defendants called upon the plaintiffs for orders, however he was told there was nothing for him. Subsequently, in November 1915, the defendants offered the plaintiffs 20 - 30 dozens skins similar to those previously supplied to them at the same price, but the plaintiffs replied that they already bought some time ago and that their requirements for the next year already fulfilled. In July 1917, the plaintiffs requested the delivery of the balance of 30 dozen skins under the contract, but the defendants refused to deliver them, alleging that the contract was no longer in existence.

The plaintiffs brought an action in the county court against the defendants for breach of contract, which went on appeal to the divisional court. The issue was whether the plaintiff had conducted himself in such a way that the defendants reasonably believed that the plaintiffs considered the contract was at an end. It was held on appeal that:

> (1) that an inordinate delay on the part of both sides having taken place it was not necessary, in order to put an end to the contract, for the defendants to give notice to the plaintiffs that if they did not request further deliveries the defendants would cancel the contract, and that there was evidence upon which the county court judge could find that the contract had been abandoned; (2) upon the facts the county court judge was justified in finding that the plaintiffs were estopped from denying that the contract had come to an end.

Mc Cardie J in *Pearl Mill Co Ltd v. Ivy Tannery Co Ltd* referred to *Jones v. Gibbons* [1853] Exch 920 where he differentiated between contracts for the sale of goods and other contracts on the issue of rescission of contracts:

> ... in *Jones v. Gibbons* it was held that the mere lapse of a reasonable time did not entitle the vendor to put an end to the contract, but that before he could take that course he must give notice to the vendee. I regard *Jones v. Gibbons* as a well settled and weighty authority, but in my view it in no way conflicts with other and well known principles of law, such that which permits parties to rescind, or that *which leads the court to infer the abandonment of contractual obligations*. Contracts for the sale of goods frequently require the performance of acts by a vendee before the obligation of delivery falls or becomes imperative upon the vendor - for example, where the class of goods, the size, or the quantities must be specified by the purchaser, In such a contract where the words "as required," or the like words, do not appear, then upon the passing of a reasonable time the vendee will have lost his right to call upon the vendor to deliver; but where the words "as required" appear a particular duty is cast upon the vendor by virtue of the decision in *Jones v. Gibbons*. Reasonable time is of course a matter which depends upon the nature of the contract, its terms, the class of goods, the practice of the trade, and the general circumstances of the case .... where the contract is one where one to which *Jones v. Gibbons* applies it is clear that a mere lapse of a reasonable time does not *ipso facto* deprive the vendee of his rights, but that rule in no way prevents the operation of the other rules of law which are applicable to contracts. *Mere delay or the mere lapse of reasonable time is one thing, but an inordinate lapse of time is wholly different. The former may not give rise to the implication of abandonment, the latter may do so*.
>
> ...
>
> There is one further ground on which, in my opinion upon the facts and documents proved, he could also give judgment in favour of the defendants, that is, upon the principle of estoppel which is represented by the well-known cases of *Picard v. Sears* and similar authorities.
>
> (emphasis added)

[104] The plaintiffs' decision and actions to proceed with the 15 storey building and keeping silent for five years, and letting the completion date of the project under the SPAs 2007 lapse, are certainly conduct amounting to an abandonment of the SPAs 2007 and 7½ storey building by election. The concept of estoppel by election was explained by the House of Lords in the case of *Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India ("The Kanchenjunga")* [1990] 1 Lloyd's Rep 391:

> It is commonplace that the expression "waiver" is one which may, in law, bear different meanings. In particular, it may refer to a forbearance from exercising a right or to an abandonment of a right. Here we are concerned with **waiver in the sense of abandonment of a right which arises by virtue of a party making an election**. Election is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, **when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so**.
>
> (emphasis added)

From the evidence adduced so far, the plaintiffs knew DBKL had given conditional approval for the 15 storey building which contradicts to what the plaintiffs are entitled to, in the SPAs 2007. This presents a state of affairs to the plaintiffs in which the plaintiffs under the SPAs 2007 are to exercise their right to insist on the 7½ storey building. However, the plaintiffs did not elect as such for five years, even to the point of letting the completion date under the SPAs 2007 lapse. By their conduct, they chose to waive their rights under the SPAs 2007 and allow the 15 storey building to proceed which means they had abandoned their rights under the SPAs 2007, and chose to elect for the 15 storey building.

The court in *Hellas (Corinth) Refineries SA* further explained the concept of estoppel by election:

> Characteristically, the effect of the new situation is that a party becomes entitled to determine or rescind the contract, or to reject an uncontractual tender of performance; but, in theory at least, a less drastic course of action might become available to him under the terms of the contract. *In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it*.
>
> (emphasis added)

Similarly, in our present appeals, during the course of the interval of five years, the plaintiffs are deemed to have elected not to exercise their rights which has become available to them under the SPAs 2007.

[105] Further, the learned High Court Judge acknowledged that the 7½ storey building has been changed to the 15 storey building when she ordered at para. 3(b) of the court order that the defendants are entitled to all costs and expenses for changing a 7½ storey building to a 15 storey building. By granting this order, the learned High Court Judge had contradicted her findings that the SPAs 2007 is still valid. Why should the learned High Court Judge allow the defendants to claim for the costs incurred for changing the 7½ storey building to the 15 storey building, if the SPAs 2007 is still valid. There was no explanation for this by the learned High Court Judge. If the court expressly allowed the claim for expenses for changing the 7½ storey building to the 15 storey building, it means the SPAs 2007 is not valid nor relevant anymore. However, if the SPAs 2007 is still valid, then prayer 3(a) should not be ordered at all. In the absence of any explanation or justification, this appears to be a contradiction in terms in the finding and the order made by the learned High Court Judge.

[106] Hence, whether the estoppel is by way of abandonment, encouragement, representation, waiver or election, it applies across the board from the facts in the present appeal. From the conduct of the plaintiffs, they are now estopped from asserting the validity of the SPAs 2007.

The Joint Venture Agreement (JVA)

[107] The JVA for the 15 storey building was drafted by the plaintiffs' solicitors in June 2010. It is undisputed that it was never signed by the parties.

[108] The plaintiffs through Alvin Thong (PW1) contend that the reason why it was not executed by the parties is because "Dato' Tan Poh Soon (DW2) liked his small retail model (SRM) so much that he decided to partner me to buy out the Hong Kong investors". Whereas the defendants are saying that it was not signed because the plaintiffs had no funds to proceed with the 15 storey building.

[109] The learned High Court Judge held that it is the defendants who refused to sign the JVA and it is the defendants "who were dragging their feet in the execution of the JVA for the 15 storey building".

[110] Dato' Tan Poh Soon (DW2) said that the plaintiffs are prepared to sign the agreement and he believed that the plaintiffs did not sign the JVA because they could not get funding for the 15 storey building. In support of these contentions, the defendants had adduced evidence as follows:

(i) The plaintiffs' SSM reports showing negative cash flow for each plaintiff (refer to pp. 838, 844, 856, 862 and 868 of Jilid 2(8) CB);

(ii) Alvin Thong's (PW1) in cross examination said that "the local companies do not have money ..." (p. 304 Jilid 2(2) of the CB);

(iii) Alvin Thong's (PW1) admission that Simon Tam (the plaintiffs' director and shareholder) sent an e-mail on 22 November 2010 giving warning that the plaintiffs' cash management will become critical if D1 asked for a 30% deposit payment for building 2 (pp. 250-251 and p. 725 Jilid 2(7) of CB).

From the aforesaid, there are contemporaneous documentary evidence adduced by the defendants to show that the plaintiffs are financially strapped. The aforesaid evidence was never considered by the learned High Court Judge. There was also no explanation by the learned High Court Judge as to how she had arrived at the conclusion that it was the defendants who had refused to sign the JVA and that the defendants were dragging their feet in the execution of the same. There is no basis provided by the learned High Court Judge for such findings. This amounts to perverse findings by the learned High Court Judge where appellate intervention is necessary (refer to *Yap Seong Yee v. Eureka Property Management Sdn Bhd & Another Appeal* [2018] 8 CLJ 713; [2018] 6 MLJ 799, *Henderson v. Foxworth Investments Limited* [2014] UKSC 41).

Whether The JVA Was Abandoned Due To The SRM Which Led To The "Buy Out"

[111] It is the finding of the learned High Court Judge that "PW1 had in the meantime come up with his small retail model (SRM)" and that "DW2 bought into PW1's SRM model and he then embarked on a scheme to buy out the six plaintiffs' interest in "Times Avenue"" (para. [50] of the grounds of judgment).

[112] Alvin Thong (PW1) asserts that the JVA was abandoned because of the SRM which led to the "buy out" of the Hong Kong investors. As it is the plaintiffs who assert the existence of the SRM, the burden is on the plaintiffs to prove the same. However, the plaintiffs failed in this respect, be it by letters, e-mails or any form of documentary evidence. Alvin Thong (PW1) said that he paid RM120,000 for the valuation report for the SRM, but no evidence of any form of valuation report nor any bill or invoice for RM120,000 were adduced before the court. The plaintiffs did not produce the video or the valuation report of any of the alleged feasibility studies or the rental market study or air tickets to show the plaintiffs' professional team had travelled to four cities for the valuation report. As there is no proof of the existence of the SRM, how could the plaintiffs assert that the reason the JVA was abandoned was due to the SRM. Neither is there proof of the existence of the SRM, hence how could there be proof of any "buy out" of the Hong Kong investors by the defendants. Alvin Thong (PW1) admitted that there is nothing before the court to show the existence of the SRM. The Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 cautioned against the reliance on recollection of witnesses of events especially if he is a witness with a purpose to serve:

> ... it is safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve.

Similarly in the present appeal, clearly Alvin Thong (PW1) failed to produce any documentary evidence of the existence of the SRM. Thus what the court is left with is his oral evidence as to events and facts. The evidence of PW1, at best is self-serving. It is not safe to rely on his oral evidence.

[113] As there is no proof of the existence of the SRM, the findings of the learned High Court Judge that "PW1 had in the meantime come up with his small retail model (SRM)" and that "DW2 bought into PW1's SRM model and he then embarked on a scheme to buy out the six plaintiffs' interest in Times Avenue" is clearly unsubstantiated (para. [50] of the grounds). In fact, there was no consideration by the learned High Court Judge of the contemporaneous documentary evidence adduced by the defendants nor any judicial appreciation given to the evidence by Alvin Thong (PW1) that there is nothing before the court to show the existence of the SRM. Therefore, Alvin Thong's (PW1) evidence that the JVA was abandoned because of the existence of the SRM is not supported by any documentary evidence. Consequently, as there is no SRM, the one and only reason for the JVA not signed (which is borne out from the documentary evidence as adduced by the defendants), is due to the plaintiffs not having the funds to execute the same.

[114] The learned High Court Judge made further findings that:

(i) Alvin Thong (PW1) and Dato' Tan Poh Soon (DW2) taking over the development of the 15 storey project (building 2) to the exclusion of the six plaintiffs (para. [52] of the grounds);

(ii) Dato' Tan Poh Soon (DW2) and Alvin Thong (PW1) not being able to raise funds within the time agreed to effect a refund to the plaintiffs in the manner stipulated in the time draft term sheet and therefore could not commit to the "term sheet" and so the draft term sheet remained unexecuted (para. [53] of the grounds);

(iii) Dato' Tan Poh Soon (DW2) and Alvin Thong (PW1) spending the years from 2011 to 2016 trying to raise external funds in order to pay off the plaintiffs and take over the development of building 2 "private" ie, to be developed by them alone (para. [54] of the grounds);

(iv) Unfortunately, all these efforts failed. External money could not be raised and the "term sheet" remained unexecuted by all parties.

[115] We find that the aforesaid findings of the learned High Court Judge are erroneous as it is against the evidence from the contemporaneous documents. A perusal of the "term sheet" (pp. 720-724 of Jilid 2(6) of the CB), shows that:

(i) it appears to be an internal discussion paper of the plaintiffs which has comments by Derek Chan (PW2) and James Edwin and there is no execution page at the end. When the "term sheet" was put to Dato' Tan Poh Soon (DW2), he said in evidence that he has never seen it before or discussed with Alvin Thong (PW1) (pp. 458 and 479 of Jilid 2(3) of CB).

(ii) Despite the learned High Court Judge's findings that the "plaintiffs were to be returned their deposit of RM12,672,016 and in addition were guaranteed a profit of RM40,000 to be paid by Dato' Tan Poh Soon (DW2) and Alvin Thong (PW1) in equal proportion" (para. [52] of the grounds), there is no documentary proof to support such allegation that Dato' Tan Poh Soon (DW2) was committed to pay half of RM52,672,016. The absence of documentary proof was admitted by Alvin Thong (PW1) and there is nothing in writing from Dato' Tan Poh Soon (DW2), to say he agrees to pay this amount.

(iii) According to Alvin Thong (PW1) the "term sheet" was prepared by Dato' Tan Poh Soon (DW2) and him. Alvin Thong (PW1) also alleged that Dato' Tan Poh Soon (DW2) and him "Jointly offered to buy out the shareholders of the six companies". However the "term sheet" which was produced and relied on shows the sale of the shares in only two out of the plaintiffs' companies, Alpha Sanctuary Sdn Bhd and Cascade Missions Sdn Bhd.

(iv) The learned High Court Judge seemed to have missed the point when she was also of the view that the "buy out" involved all six plaintiffs and failed to notice the self serving "term sheet" produced by the plaintiffs which only involved the two plaintiffs.

(v) In view of the contradictions and the inconsistencies between Alvin Thong's (PW1) statements (buy out six companies) and the plaintiff's own documents (sale of shares in two companies) how can there be a conclusive finding that there is a "buy out". There is obviously no nexus between the "buy out" and Dato' Tan Poh Soon (DW2) or even the taking over of the development of the 15 storey project or the commitment to paying of the "buy out" amount of RM52,672,016.

There was no evidence to support the above-said findings by the learned High Court Judge. There was also no evidence to show that from 2011 to 2016, Dato' Tan Poh Soon (DW2) and Alvin Thong (PW1) were trying to raise funds. Neither was it put to Dato' Tan Poh Soon (DW2) at trial. It was only brought up for the first time in the plaintiffs' submission.

[116] On the issue that the term sheet is in part B document by agreement of the parties, and hence the plaintiffs submit that the defendants have no basis to challenge on the authenticity of the term sheet, it is trite law that when a document is placed in part B document, it does not mean that the

truth of the contents are automatically proven (Refer to Court of Appeal decision in *Tay Chye Huat v. Astral Supreme Berhad* [2016] 1 LNS 1129; [2016] AMEJ 2193). Although a document is in Part B, which means that the authenticity or the making of the document is not disputed, the contents must still be proven. Section 101 of the Evidence Act 1950 provides that one who asserts a fact, must prove that fact. In the present appeal, it is for the plaintiffs to prove the contents of the term sheet by calling the maker, as the terms sheet appears to be crucial to prove that there was a "buy out" by the defendants. From the evidence, it is unclear as to who was the maker. The plaintiffs have never said at the trial who actually prepared the "term sheet". Here, the maker of the "term sheet" was never called. Therefore, the contents of the term sheet was never proven.

[117] Therefore, on a balance of probabilities, there is no evidence to prove the existence of any SRM or any "buy out" of the Hong Kong investors which had caused the JVA to be abandoned.

[118] Even assuming that the "term sheet" exists (which we have found to be not proven), this goes to support the contention that the parties are moving away from the SPAs 2007. Dato' Tan Poh Soon (DW2) said in evidence that the plaintiffs agreed to sell the new SRM project to him (DW2) and Alvin Thong (PW1) for RM52.67 million. If what the assertion by the plaintiffs is true, ie, that the plaintiffs still want the 7½ storey building and all their rights under the SPAs 2007, then why would the plaintiffs want to sell the SRM project.

[119] It is in evidence by Derek Chan (PW2) that the plaintiffs wanted to go ahead with the new SRM project since it is worth RM500 million but they did not proceed because the plaintiffs were informed by Alvin Thong (PW1) that Dato' Tan Poh Soon (DW2) did not want the Hong Kong investors as partners for the new SRM project. Alvin Thong (PW1) said that Derek Chan (PW2) and him (PW1) proposed to buy the Hong Kong investors out. These evidence were to corroborate what was said by Alvin Thong (PW1) in an alleged telephone conversation with Derek Chan (PW2). In any event Derek Chan (PW2) admitted that the plaintiffs agreed to sell their interest for the new SRM project for RM52.67 million (Refer to p. 363 of the CB). Derek Chan (PW2) confirmed that time was given to Dato' Tan Poh Soon (DW2) and Alvin Thong (PW1) to raise funds to buy the SRM project. Hence, from the aforesaid evidence of the SRM project (if true exists), it goes to show that parties were no longer transacting the subject matter of the SPAs 2007 but a 15 storey building designed by Alvin Thong (PW1). Clearly from the aforesaid, the plaintiffs here are approbating and reprobating, which cannot be allowed. Given the conduct of parties, to say that the SPAs 2007 is still alive, is misconceived.

Whether The Caveats Should Be Removed And Damages Against My Influx Sdn Bhd And Cascade Missions Sdn Bhd

[120] It is the submission of the plaintiffs that they have a beneficial interest in the undivided share of the land. This is erroneous as clearly the plaintiffs had not paid the full purchase price of the property. This is a requirement before one can be vested with any beneficial interests in the property. Support for this proposition can be found in the Federal Court case of *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193; [2016] 2 AMR 813 which held that a beneficial right or interest only arises upon full payment of purchase price:

> [34] According to this principle, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become it registered owner.
>
> [35] This is clearly demonstrated by the case of *Raju J a/l M Kerpaya @ Jayaraman a/l M. Kerpaya*, where the Supreme Court held that:
>
> > ... the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it on the purchaser at the time when the purchase money had been paid in full.

[121] In addition, it is provided in cl. 5.17 of the SPAs 2007 that expressly prohibits the plaintiffs from entering any caveat on the land. Therefore, the plaintiffs have no basis to enter the caveats on the land.

[122] As the plaintiffs have abandoned the SPAS 2007 and elected to opt for the 15 storey building, the caveats are ordered to be removed forthwith and damages to be assessed.

Whether The Plaintiffs Can Claim For Compensation Pursuant To Section 18 Of The Specific Relief Act 1950, And If Allowed, Whether The Defendants Are Entitled To Set Off From Such Compensation All Costs And Expenses Incurred For The SPAs 2007 And Changing The 7½ Storey Building In The SPAs 2007 To A 15 Storey Building

[123] There was no mention of any damages or compensation in the plaintiffs' witness statement. However Derek Chan (PW2) in his witness statement said that:

> We just want the original Project built and delivered to us. If that is not possible then maybe the fair alternative is to put up the land for auction and the proceeds disbursed as suggested in the Writ.

The plaintiffs offered no evidence to challenge the defendants' counterclaim. Therefore the defendants are entitled to the claim for whatever set off, from the monies due to the plaintiffs, of the expenses that the defendants had

incurred when changing from the 7½ storey building to the 15 storey building. From the evidence, there is no dispute as to the aforesaid expenses incurred by the defendants as was found by the learned High Court Judge when she ordered that the defendants are entitled to the costs and expenses incurred for changing the 7½ storey building to a 15 storey building.

Conclusion

[124] We found that there is overwhelming and cogent evidence that parties have moved from the SPAs 2007 to the proposed JVA and that parties have conducted themselves accordingly. The SPAs were signed in 2007 with the agreed completion date to be sometime in 2010 yet the plaintiffs had chosen to let it pass until 2015 when the issue of caveat was raised in the correspondences between the solicitors of both parties.

[125] From the facts and circumstances, and the conduct of the plaintiffs, the plaintiffs are estopped from asserting the validity of SPAs 2007. The learned High Court Judge was plainly wrong in not considering the contemporaneous documentary evidence but merely stated that it was the defendants who were dragging their feet without any supporting evidence to form the basis for her finding.

[126] We therefore allowed the appeal of the D1 and D2 with costs. In respect of the refund of the deposit, we found that D2 is not liable. As far as D1 is concerned, D1 conceded that the deposit be refunded to the plaintiffs subject to set off in relation to the costs and expenses incurred by D1 in relation to the proposed 15 storey project.

[127] We therefore set aside the order of the learned High Court Judge and substituted with the following order:

(i) the six appeals by D1 and D2 (appellants) are allowed;

(ii) D1 is to refund the payment of 35% of the purchase price to the plaintiffs subject to a set off of all costs and expenses incurred by the defendants in changing the 7½ storey building to the 15 storey building, which is to be assessed;

(iii) the two caveats lodged by the plaintiffs (My Influx Sdn Bhd and Cascade Mission Sdn Bhd) to be removed and damages to be assessed;

(iv) costs of RM40,000 for all six appeals to the defendants subject to allocator and deposit refunded. We ordered that the assessment of damages to be undertaken before a High Court Judge.